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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE MISKOVSKY,
Petitioner,

v.

WORLD PUBLISHING COMPANY, and
NEWSPAPER PRINTING CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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QUESTIONS PRESENTED FOR REVIEW

1. Does the United States Constitution supplant state defamation law on the issues of defamatory meaning, opinion, and burden of proof as to truth?

2. Does the United States Constitution require a balancing between the rights of media defendants and the rights of candidates for public office to freedom of speech and protection of reputation?

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IN THE

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OCTOBER TERM, 1983

No.

GEORGE MISKOVSKY,

Petitioner,

v.

WORLD PUBLISHING COMPANY, and
NEWSPAPER PRINTING CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioner, George Miskovsky, respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of the State of Oklahoma, entered on June 21, 1983, affirming the trial court's sustention of a demurrer to Miskovsky's libel petition, and determining that said petition was not amendable.

OPINION AND ORDER BELOW

The opinion of the Oklahoma Supreme Court, which appears in the Appendix at 1a, has not been officially reported. The Oklahoma Supreme Court determined that the case of Miskovsky v. Tulsa Tribune Company and Newspaper Printing Corporation, decided on the same date, presented identical issues and adopted what was

said in Tulsa Tribune as being the law of the case. This opinion has been officially reported at Vol. 54 Oklahoma Bar Journal 1751 and appears at Appendix B 3a et seq. The order of the Oklahoma Supreme Court denying petitioner's motion for rehearing appears at Appendix C, page 18a.

JURISDICTION

The opinion of the Oklahoma Supreme Court in this case was issued on June 21, 1983. The order denying petitioner's motion for rehearing was issued on October 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution, Amendment I: Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

2. United States Constitution, Amendment XIV § 1: [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

A. Procedural Background

Petitioner, George Miskovsky [hereinafter "petitioner" or "Miskovsky"], a candidate in 1978 for the United States Senate, instituted this action for libel in the District Court of Creek County, Oklahoma. The libel arises out of five newspaper stories, and one editorial, all appearing in The Tulsa World, a newspaper published by the respondents World Publishing Company and Newspaper Printing Corporation [hereinafter "The World"].

The District Court of Creek County, Oklahoma, sustained a demurrer to Miskovsky's petition and determined that the petition was not amendable. The Supreme Court of the State of Oklahoma affirmed the trial court's ruling on June 21, 1983.

B. Identification of Parties

1. Petitioner George Miskovsky, son of immigrant parents, was born and raised in Oklahoma. He graduated from the University of Oklahoma Law School with high honors, including induction into Order of the Coif. Upon graduation from law school, Miskovsky was admitted to the Oklahoma Bar. He has practiced law in Oklahoma City for more than forty years. During his career, Miskovsky has served as Public Defender, County Attorney, State Representative, and State Senator. In 1958, he was a candidate for Governor. Twenty years later, at the age of sixty-eight, Miskovsky became a candidate for the office of United States Senator.

2. Respondents are privately held media corporations controlled by the Jones family. The newspapers involved in this case and its companion case are *The Tulsa Tribune* and *The Tulsa World*. These papers have a combined circulation of approximately 205,000 daily copies and 220,000 Sunday copies and are distributed throughout the states of Oklahoma, Kansas, Arkansas and Missouri.

C. Factual Basis of the Libel Claim

The factual basis of the libel claim is summarized below from Miskovsky's First Amended petition filed May 16, 1980, and upon which the trial court sustained a demurrer and The Supreme Court of Oklahoma affirmed.

1. *The Press Conference*

On August 9, 1978, during the course of the United States Senate primary race, Miskovsky attended a candidate's forum in El Reno, Oklahoma, sponsored by the Women's Democratic Club of Canadian County. The forum was open to all candidates, including Governor David Boren, State Senator Gene Stipe, former Congressman Ed Edmondson, Dean Bridges, Rosella Saker, and Anthony Points. In addition to Miskovsky, only candidates Bridges and Points chose to attend.

While addressing the group, candidate Points read from a political flyer, copies of which he had distributed to the audience. In part the flyer stated:

> "I am against homosexuals or bisexuals in office or government. They are threats to our national security. They are subject to be blackmailed and will give out a favor or leak information from the government in return for having their homosexual identity kept secret.
>
> "There is a side of David Boren that is a known fact in legal and political circles. And that's the fact that David Boren frequents with homosexuals and I'm putting it lightly.
>
> "I don't think that is what you want for a U.S. Senator."

In addition to reading these remarks, candidate Points categorically stated that "Governor David Boren is a homosexual".

Prior to this public charge by candidate Points, Miskovsky, as well as The World, had heard homosexual rumors that had been in circulation for four years or more concerning candidate Boren. These rumors were verified by the Governor's own staff.

The following day, August 10, Miskovsky delivered a letter to Governor Boren's office. The letter quoted the charges made by Points and requested the Governor to answer the charges under oath. The letter made clear that Miskovsky himself was making no allegations about Governor Boren. The letter also made clear that the purpose of the inquiry was for national security reasons since "A U.S. Senator has access to highly sensitive information vital to the defense of this country and our NATO allies." Appendix 29a.

Miskovsky attended a press conference that same day and distributed copies of the letter to members of the news media.

2. *The World's Reaction*

From August 11-14, The World published five news stories and one editorial, falsely charging or implying that Miskovsky had accused Governor Boren of homosexuality; that Miskovsky has taken the prize for the filthiest stunt that has ever been pulled by a serious candidate for major public office in the state; and that Miskovsky should save his gutter theatrics for the next time he is defending some scoundrel in criminal court. Appendix 33a *et seq.*

D. Federal Questions Properly Raised

The federal questions raised in this petition were properly raised before the Oklahoma Supreme Court. Petitioner contended (1) that the United States Constitution does not supplant state defamation law on the issues of defamatory meaning, opinion, and burden of proof; (2) that defamatory statements of opinion are not protected under the First Amendment to the Constitution of the United States; and (3) that the First and Fourteenth Amendments prohibit a rule of law which grants virtual absolute immunity to a media defendant from libel suits brought by a public figure. Appellant's Brief in Support of Petition for Rehearing at 2-7.

REASONS FOR GRANTING PETITION

When this Court ruled in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), that the First Amendment requires a public figure to prove actual malice in order to prevail in a libel case, the Court did not intend to abolish the common law of libel. The Oklahoma Supreme Court, however, erroneously concluded that under *New York Times* and its progeny the Oklahoma law of libel had been supplanted by federal constitutional law.

It is apparent from the opinion of the Oklahoma Supreme Court that the Court incorrectly believed that

state law on the issues of defamatory meaning, opinion, and burden of proof have been both superseded and controlled by the requirements of the Constitution.

Thus, this Court should grant review because the decision of the Oklahoma Supreme Court raises important federal questions not decided by this Court concerning the extent of federal constitutionalization of state defamation law.

I. THE UNITED STATES CONSTITUTION DOES NOT SUPPLANT STATE DEFAMATION LAW ON THE ISSUES OF DEFAMATION MEANING, OPINION AND BURDEN OF PROOF

Independent state law on the subject of defamatory meaning is found in *Wimmer v. The Oklahoma Publishing Company*, 1 P.2d 671, 673 (Okl. 1931):

> "The publication cannot be measured by its effect when subjected to the critical analysis of a legal mind; it must be measured by its natural and probable effect upon the mind of the average lay reader."

It is clear from the Supreme Court of Oklahoma's opinion that each publication was in fact subjected to the critical analysis of legal minds under the mistaken conclusion that the Constitution requires such construction.

Further, in deciding that the publications are not defamatory, the Supreme Court of Oklahoma ruled that the publications are not actionable because they are merely expressions of opinion, privileged under the First Amendment. In making this determination, the Court relies on *dicta* contained in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1974):

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

In *Miskovsky v. Oklahoma Publishing Company*, 654 P.2d 587 (Okl. 1982), cert. denied, —— U.S. ——, 103 S.Ct. 235 (1982), Justice Rehnquist, with whom Justice White joined, dissenting, stated:

> "Whether or not these particular statements in respondent's newspapers were actionable under state and federal constitutional law is not clear to me. What is clear is that the Supreme Court of Oklahoma, apparently feeling itself bound by the Decisions of this Court in cases such as *New York Times v. Sullivan, supra*, and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) said categorically that several of respondent's statements were simply statements of opinion, and that "[a]s opinions they are not statements of fact, and therefore cannot be false." Pet. 12a (emphasis supplied).
>
> "The Supreme Court of Oklahoma also said:
>
> > 'Like the U.S. Supreme Court, we also, in proper cases, must review the evidence to make certain that constitutional principles have been correctly applied. The case before us is such an instance.' —— P.2d —— (Okla. 1981).
>
> "From this and similar statements in its decision, it is quite possible to conclude that the Supreme Court of Oklahoma thought that the entire law of defamation, hitherto the province of the states, had been preempted by federal constitutional standards. This, of course, is not the case, as we have made clear in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and succeeding cases. If statements in the decision of the Supreme Court of Oklahoma such as that quoted above with respect to "opinion" not forming the basis of a libel action were applications of Oklahoma law, they would of course present no federal question. But it seems probable to me that the Supreme Court of Oklahoma in discussing the subject was relying on the following *dicta* in *Gertz v. Robert Welch, Inc.*, supra:

> 'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.' 418 U.S., at 340.

"A respected commenator on the subject has stated with respect to this quotation that '[t]he problem of defamatory opinion was not remotely an issue in *Gertz*, and there is no evidence that the Court was speaking with an awareness of the rich and complex history of the struggle of the common law to deal with this problem.' Hill, Defamation and Privacy Under the First Amendment, 76 Colum. L. Rev. 1205 (1976).

"Examples of the 'rich and complex history' of the common law's effort to deal with the question of opinion are found in an entire chapter headed "Opinion" in R. D. Sack, Libel, Slander, and Related Problems (1980). I am confident this Court did not intend to wipe out this 'rich and complex history' with the two sentences of *dicta* in *Gertz* quoted above. The Supreme Court of Oklahoma's statement that opinion was not actionable may fairly be read to suggest that the court felt this result to be compelled by the Untied States Constitution, rather than merely being a statement of Oklahoma law. Under these circumstances, we have jurisdiction to review the judgment of the Supreme Court of Oklahoma, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), and I would exercise that jurisdiction by granting the petition for certiorari in this case."

Courts and commentators have concluded that the press is not immunized by a constitutional exception for defamatory statements of opinion. A statement labelled "opinion" mixed with fact or which imply the existence of undisclosed defamatory facts do not enjoy the protection of the First Amendment. *Buckley v. Littell*, 539

F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977); *Restatement (Second) of Torts*, Sec. 566 (1977); *Rand v. New York Times*, 4 Med. L. Rptr. 1557 (1978); *Ciani v. New York Times*, 6 Med. L. Rptr. 1625 (1980).

Additionally, the Supreme Court of Oklahoma has shifted the burden of proof under the belief that the Constitution requires a public figure plaintiff to prove falsity. Citing *Miskovsky v. Oklahoma Publishing Company, supra.*

Under independent state law, truth has been an affirmative defense to a libel action. *Hetherington v. Griffin Television, Inc.*, 430 F.Supp. 493 (W.D.Okl. 1977).

New York Times v. Sullivan, supra, did not shift the burden to plaintiff to prove the falsity of a defamatory communication. Eaton, *The American Law of Defamation Through—Gertz v. Robert Welch, Inc., and Beyond*: an analytical Primer, 61 Va. L. Rev. 1349, 1381-1382 (1975).

Subsequent decisions of this Court have continued to refer to truth as a defense. *St. Amant v. Thompson*, 390 U.S. 727, 731-732 (1968). Consider also the words of Justice Harlan in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 151 (1967), that truth is "an absolute defense in almost all cases."

The inequity of requiring a public figure libel plaintiff to prove falsity was pointed out by the Pennsylvania Supreme Court:

> "Common decency would seem to require that the defaming defendant have the burden of substantiating the accusations, especially when, in many instances, a defamed but innocent plaintiff may not be able to adduce more evidence than a denial that he or she committed the offense charged." *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 468, 273 A.2d 899, 917 (1971).

Freedom of the press under the First Amendment does not include the absolute license to destroy lives and careers. *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 339-41. The extraordinary protections afforded to the press by the First Amendment carry with them a type of fiduciary duty to exercise the protected rights responsibly. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 560 (1976). When the press violates this fiduciary duty, then the injured party should be entitled to recover for damage to his reputation.

In sum, this Court should review the Oklahoma Supreme Court decision and decide the extent to which federal constitutional law has supplanted state law in libel actions.

II. THE FIRST AND FOURTEENTH AMENDMENTS PROHIBIT A RULE OF LAW WHICH GRANTS VIRTUAL ABSOLUTE IMMUNITY TO A MEDIA DEFENDANT FROM LIBEL SUITS BROUGHT BY A PUBLIC FIGURE BECAUSE SUCH A RULE WOULD CHILL THE FIRST AMENDMENT RIGHTS OF PETITIONER AND OTHER CANDIDATES FOR PUBLIC OFFICE

The first amendment fulfills an important function in our society in preserving the integrity of the electoral process. As this Court has observed, "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). The constitutional guarantee of freedom of speech "has its fullest and most urgent application precisely to the conduct of campaigns for public office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). "The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election." *Buckley v. Valeo, supra*, 424 U.S. at 52. "Democracy depends on a well informed electorate, not a citizenry . . . limited

in its ability to discuss and debate candidates and issues." *Id.* at 49, n.55. Further, "the press does not have a monopoly on either the First Amendment or the ability to enlighten." *First National Bank of Boston v. Bellotti*, 435 U.S. 776, 782 (1978); *Cf. Pell v. Procunier*, 417 U.S. 817 (1974). "[T]he purpose of the Constitution was not to erect the press into a privileged institution but to protect all persons in their right to print what they will as well as to utter it." *Id.*, at 802 (Burger, C.J., concurring), citing *Pennekamp v. Florida*, 328 U.S. 331, 364 (1946) (Frankfurter, J., concurring). "And self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.'" *Associated Press v. United States*, 326 U.S. 1, 20 (1945), cited in *Bellotti, supra*, 435 U.S. at 777, n.12. The Oklahoma Supreme Court's decision sustaining a demurrer to Miskovsky's petition without leave to amend infringes upon Miskovsky's First and Fourteenth Amendment rights and encourages the press to limit public debate in future elections.

The Constitution serves significant societal interests and often protects interests broader than those of the party seeking their vindication. As this court emphasized in *Bellotti, supra*, 435 U.S. at 776:

> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. *Thornhill v. Alabama*, 310 U.S. 88, 101-102 (1940).

"[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo, supra*, 424 U.S. at 48-49.

To allow the Oklahoma Supreme Court's decision to stand would effectively grant the press immunity and

permission to knowingly defame and villify any candidate not to its liking under the cloak of the First Amendment.[1] Further, to allow the decision to stand will discourage many good men and women from entering the political arena for fear of becoming subject to the same type of attack by irresponsible members of the press.

"The authors of the Bill of Rights did not undertake to assign priorities" to constitutional rights. *Nebraska Press Association v. Stuart*, 427 U.S. 539 at 561. Nor did the authors of the Bill of Rights intend that freedom of the press vested in a multi-media conglomerate be abused with impunity and with immunity in such a fashion as to stifle petitioner's First Amendment rights.[2] The policies and political principles underlying the Bill of Rights require a balancing between petitioner's right to protect his reputation and to speak freely during a campaign for public office and the press's right of fair comment. The grant of virtual absolute immunity to the press would require a candidate who runs for public

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[1] According to a recent survey, plaintiffs suing media defendants fare badly and win judgments in only 5% of the media appeals. The survey included only reported cases, most of which were appellate cases. Therefore, the survey seems to overstate the likelihood of a successful suit for libel by a public figure because defendants are much less likely to accept adverse judgments at the trial level than are plaintiffs. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, Am. Bar Foundation Research J., 493, 498 (Summer 1980).

[2] In its attack on Miskovsky, the press is also restricting the access of Oklahomans to the ballot, effectively burdening two separate rights—"the right of individuals to associate for the advancement of political beliefs and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 30 (1968), cited in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). By infringing on petitioner's rights, the press "impairs the voters' ability to express their political preferences." *Id.* In his action for defamation petitioner thus seeks to vindicate these rights as well.

office without the press's endorsement to sacrifice his right of free speech and his right to his good name as a condition of candidacy, contrary to *Nebraska Press Association*.[3] For where law ends, tyranny begins.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the Supreme Court of Oklahoma reversed with directions that Miskovsky be allowed his day in court before a jury of his peers.

Respectfully submitted,

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[3] State constitutions approved contemporaneously with the passage of the Bill of Rights do not reveal any settled belief that civil awards of damages for defamation were inconsistent with the right of free speech and free press; in fact, some state constitutional provisions adopted in the late eighteenth and early nineteenth centuries expressly stated that the rights of free speech and free press could be abused by defamation. L. H. Eldredge, *The Law of Defamation*, Sec. 49 at 248 . Neither did the states intend to modify their own laws concerning defamation when they ratified the Fourteenth Amendment, *id.*, at 251.

APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

No. 55,431

GEORGE MISKOVSKY,
Appellant,

v.

WORLD PUBLISHING COMPANY, a corporation; and
NEWSPAPER PRINTING CORPORATION, a corporation,
Appellees.

[Filed Jun. 21, 1983]

APPEAL FROM THE DISTRICT COURT OF
CREEK COUNTY, OKLAHOMA
HONORABLE CHARLES S. WOODSON, TRIAL JUDGE

Appeal from an order of the trial court sustaining a demurrer to the petition in a libel case, and determining that the petition's defects are not amendable.

AFFIRMED

Carroll E. Gregg, Miskovsky, Sullivan, Miskovsky, Cooke & Gregg, Oklahoma City, Oklahoma, for Appellant.

Edwin S. Hurst, J. Schaad Titus, Boone, Smith, Davis & Minter, Tulsa, Oklahoma, for Appellees.

LAVENDER, J.:

The petition alleges that defendants below are engaged in printing, publishing and circulation of a newspaper

known as The Tulsa World of general circulation in Creek County, State of Oklahoma. Plaintiff below is a resident of Oklahoma City, a graduate of the University of Oklahoma, and a widely known practicing attorney since admitted to the Bar in 1936. He has a reputation of being a successful and responsible attorney and member of his profession. He has also been a successful businessman, active in civic and social affairs in the community and state, and at all times herein referred to, he was a duly qualified and filed candidate for the office of United States Senator.

The petition alleges the publication by defendant of six separate items in the newspaper, alleged to be libelous, all of which are writings and all relating generally to the then political campaign for the office of United States Senator.

A careful reading thereof reveals that the tenor and import of the alleged libelous publications are the same as those in the case of *George Miskovsky v. Tulsa Tribune Company, a corporation, and Newspaper Printing Corporation, a corporation*, decided on this date, and the issues presented on appeal are identical to those presented in *Tulsa Tribune Company*. We therefore adopt what we said in *Tulsa Tribune Company* as being the law in the case at bar.

The ruling of the trial court sustaining a demurrer to plaintiff's petition, and determining that the petition's defects are not amendable is hereby affirmed.

BARNES, C.J., IRWIN, HODGES, HARGRAVE, and WILSON, JJ., concur.

SIMMS, V.C.J., concurs in result.

DOOLIN, J., dissents.

OPALA, J., certified his disqualification.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 55,430

GEORGE MISKOVSKY,
Appellant,

v.

TULSA TRIBUNE COMPANY, a corporation, and NEWSPAPER PRINTING CORPORATION, a corporation,
Appellees.

[Filed Jun. 21, 1983]

APPEAL FROM THE DISTRICT COURT OF CREEK COUNTY, OKLAHOMA
HONORABLE CHARLES S. WOODSON, TRIAL JUDGE

Appeal from an order of the trial court sustaining a demurrer to the original petition and to the amended petition in a libel case, and determining that the petition's defects are not amendable.

AFFIRMED

Carroll E. Gregg, Miskovsky, Sullivan, Miskovsky, Cooke & Gregg, Oklahoma City, Oklahoma, for Appellants.

James M. Sturdivant, John Henry Rule, Gable, Gotwals, Rubin, Fox, Johnson & Baker, Tulsa, Oklahoma, for Appellees.

LAVENDER, J.:

For the purposes of this appeal, we need only consider the sufficiency of the allegations set forth in the amended petition to withstand a demurrer, the amended petition being identical to the original petition, except that the amended petition contains general allegations of special damages.

The amended petition alleges that defendants below are engaged in printing, publishing, and circulation of a newspaper known as The Tulsa Tribune of general circulation in Creek County, State of Oklahoma. Plaintiff below is a resident of Oklahoma City, a graduate of the University of Oklahoma, and a widely known practicing attorney since admitted to the Bar in 1936. He has a reputation of being a successful and responsible attorney and member of his profession. He has also been a successful businessman, active in civic and social affairs in the community and state, and at all times herein referred to, he was a duly qualified and filed candidate for the office of United States Senator.

The amended petition alleges the publication by defendant of nine separate items in the newspaper, alleged to be libelous, six of which are writings, and three cartoons, all relating generally to the then political campaign for the office of United States Senator. We will consider the allegations pertaining to the writings.

1. The first is an editorial appearing in the newspaper on August 11, 1978, headlined, "The Unqualified Candidate." A fair and objective reading of the publication discloses that it states that plaintiff, who received less than two percent of the vote in his last statewide campaign, desperately needed a political issue to put life into his hopeless campaign, asked Governor Boren, the acknowledged frontrunner in the senate race whether Boren is a homosexual or bisexual, and characterizing the query as a cruel variation of the prover-

bial lawyer's question, "Have you stopped beating your wife?", and an irresponsible smear. The article further states that the query was made without evidence of the other candidate's sexual abnormality, but was premised upon a campaign statement by a third candidate who, without any supporting evidence, stated that Boren is a homosexual. The editorial concludes by stating that the voters should not be swayed by plaintiff's descent to sewer politics, and strongly suggests that plaintiff is unqualified to be senator.

2. On the 17th day of August, 1978, an article purportedly written by one E. N. Earley entitled, "Sometimes the press a shade hypocritical," appeared in the newspaper. The article states:

> "Sometimes we members of Oklahoma's fourth estate are a bit too pious.
>
> "Such is the case with the George Miskovsky-Gov. Boren dispute.
>
> "When trailing Senate candidate Miskovsky asked Boren to answer questions about his sexual habits, editorial writers were enraged.
>
> "They called Miskovsky 'A Voice From the Sewer.' "Miskovsky's remarks were a cheap publicity stunt. But the editorial writers' surprise and shock reeks of hypocrisy."

The article further states Boren's sexual preferences were a subject of gossip among the members of the press, that Boren was aware of the gossip, but was advised that a public denial would only give credence to the rumors.

> "But when Miskovsky brought up the subject, the press was flabbergasted.
>
> "There is little doubt that Miskovsky's voice came from a sewer, but it is a sewer that was constructed —in part—by the press."

3. On the 24th day of August, 1978, an article purportedly written by one Will Sentell entitled, "Boren reverses tactics * * * Governor swears he disapproves of homosexuality," appeared in the newspaper. A fair import of the article is a speculation upon the outcome of the forthcoming election engendered by Governor Boren's public denial under oath that he has ever been a homosexual or bisexual and that he approves or condones such activities.

The article further states: " 'Boren got the message from the voters,' Miskovsky said. 'His delayed answer under oath to the questions I asked puts the issue to rest as far as I'm concerned.' "

4. On the 25th day of August, 1978, an editorial appeared in the newspaper headed "Boren's overkill." It states:

> "The spectacle of Oklahoma's Governor David Boren calling a press conference to swear on the Bible that he was not a homosexual not only marked some kind of a first in American political history, but it was utterly unnecessary.
>
> "The sensational innuendo advanced by George Miskovsky in a desperate effort to gain attention for his senate campaign had already exploded in Miskovsky's face. His miniscule vote was proof enough.
>
> "The governor pleaded not guilty in the face of no evidence to the contrary. Surely, he has a soft, baby face. But so did Audie Murphy, the most decorated U.S. hero of World War II. The governor opened himself to an immediate lampoon by his runoff opponent, Ed Edmondson, who publicly swore he was not and never intended to be a Republican.
>
> "Instead of swearing, the Governor should have simply shrugged."

5. On the 11th day of August, 1978, an article purportedly written by one Richard Tapscott appeared entitled, "Foe says Boren 'overreacted' Miskovsky questions sexual conduct." The article quoted plaintiff as saying Governor Boren and the editorial writers "overreacted" to his bringing to the public the charges made by the third candidate regarding Boren's alleged sexual preferences and conduct. "They acted emotionally as if I had made the charge. I heard the rumor, as have many others, for months. When it came to a head in a public forum, I felt I should report it to the media and give the governor an opportunity to respond." It related that plaintiff said he had received many calls, but none that says he should not have called it to the attention of the media. A spokesman for the Boren campaign was quoted as saying, "People seem to be outraged by it." Plaintiff was further quoted as saying, "I have seen these rotten, dirty, scurrilous, below-the-belt editorials before." The article speculated upon the effect of the "issue" upon the political campaign, then quoted from an anonymous "political analyst" that, "The Anthony Points thing was nothing. Miskovsky made a tremendous blunder."

6. On the 12th day of August, 1978, there appeared in the newspaper a news analysis purportedly written by one Will Sentell. In the article, the statement is made:

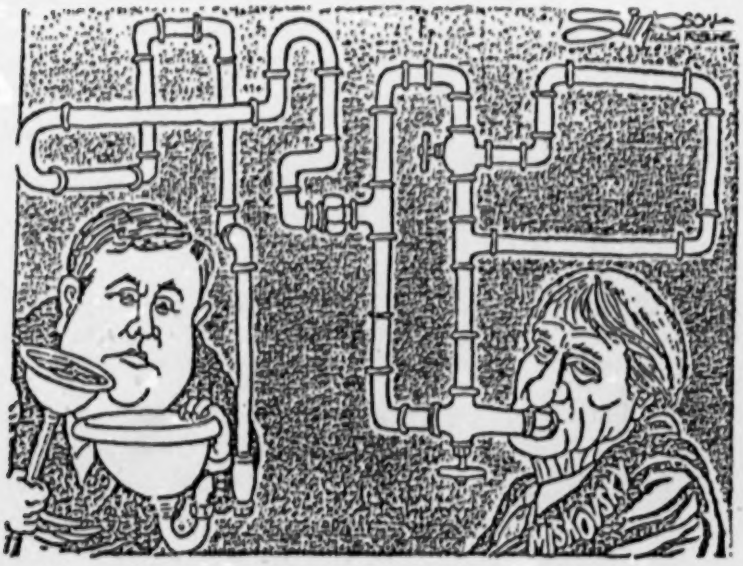
> "When longshot contenders Anthony Points and George Miskovsky quizzed Boren on his sexual life, specifically whether he is a homosexual or bisexual, without offering any evidence, a muddy race got a lot muddier.
>
> "Besides the fact Boren categorically denied the allegation, which was roundly trounced on by the state press, supporters are trying to gage what, if any, impact to expect.

"Most of the early indicators are pointing toward more good than harm going to the governor.

"A charge like the one lodged, the theory goes, will wind up bringing down fence sitters who might have otherwise stayed out of the race, or at least out of Boren and his Broom Brigade camp."

The balance of the article, insofar as pertinent, speculates upon the effect of the "issue" thus raised will have upon the election results.

7. On August 11, 1978, defendant published a cartoon, a reproduction of which is as follows:



8. On August 15, 1978, the defendants published a cartoon, a reproduction of which is as follows:

9. On August 25, 1978, defendants published a cartoon depicting in cariacture an effigy of President Carter saying, "Ah've lusted after women in muh heart—" and an effigy of Governor Boren saying, "Me too! Me too!" with no reference to the plaintiff being contained within the cartoon.

In the case of *Miskovsky v. Oklahoma Pub. Co.*, Okl., 654 P.2d 587 (1982), this Court considered in detail the burden plaintiff must meet as a public figure in order to maintain an action in libel generally. The plaintiff must show:

(1) The publication of a defamatory statement;

(2) That the defamatory statement was false;

(3) That the defamatory falsehood was made with "actual malice"—made with knowledge that it was false, or with reckless disregard of whether it was false or not;

(4) The "actual malice" must be shown with "convincing clarity";

(5) The state of mind required for actual malice would have to be brought home to the person in the publishing organization having responsibility for the publication of the alleged libelous publication;

(6) To be made with "reckless disregard," there must be a showing that the publisher in fact entertained serious doubt as to the truth of the publication.

In *Fite v. Oklahoma Pub. Co.*, 146 Okl. 150, 293 P. 1073 (1930), we held that words charged to be defamatory and therefore libelous fall into three classes:

(1) Those not of defamatory meaning;

(2) Those reasonably susceptible of both a defamatory and an innocent meaning (commonly referred to as libel per quod); and

(3) Those clearly defamatory on their face (commonly referred to as libel per se). (In accord, see *Akins v. Altus Newspapers, Inc.*, Okl., 609 F.2d 1263 (1977), cert. den., 101 S.Ct. 564.)

And, in *Winters v. Morgan*, Okl., 576 P.2d 1152 (1978), we held that in testing the sufficiency of the petition to withstand a demurrer, the entire writing must be examined by the Court to determine as a matter of law whether or not the article is libelous per se, observing: "Language out of context may have a different meaning than the same language within the four corners of the (publication)."

In *Fite v. Oklahoma Pub. Co., supra*, we said: "The true rule is that, where the publication alleged to be defamatory charges the plaintiff with nothing he might not have legally and properly done, the same cannot be

held to be libelous per se." *Fite* further held that a judicial review of whether the publication is libelous per se turns on whether the statements made in the publication, when construed by the most natural and obvious meaning and in the sense that they would be understood by those to whom they were addressed, charged the plaintiff with anything that the plaintiff might not have legally and properly done.

Tested by the foregoing principles, a careful review of the publications both separately and together clearly shows that none of them, nor do all of them collectively, state a cause of action for libel per se. None of the publications charge the plaintiff with a commission of a crime or with anything that the plaintiff might not have legally and properly done. The factual data therein set forth as *facts* are true as is alleged in the allegations in plaintiff's petition. When viewed even in their most derogatory sense as related to the plaintiff, while possibly unflattering or even reprehensively false *in their conclusions*, they are expressions of opinion, privileged under the First Amendment to the United States Constitution. Nor do the publications expose the plaintiff to public hatred, contempt, ridicule or obloquy, or tend to deprive him of public confidence, or injure him in his occupation within the meaning of 12 O.S. 1981, § 1441. *Thompson v. Newspaper Printing Corporation*, Okl., 325 P.2d 945 (1958). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed. 2d 789 (1947), the United States Supreme Court said:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."

We next turn to the question of whether the publications are *or may be* libelous per quod. In *Akins v. Altus Newspapers, Inc., supra*, this Court held (1267): "It is

a matter of law for the court to determine if the publication was libelous per se, as opposed to a fact determination for the jury as to the publication being libelous per quod." We approach this issue from two aspects: (1) The requirements for a petition for libel per quod to withstand a demurrer with reference to special damages, and (2) the requirements for a petition for libel per quod to withstand a demurrer with reference to innuendo, that is, the explanation of words that are of doubtful or ambiguous meaning, and to attach to them their proper meaning.

I.

As to the first aspect, in *Fite v. Oklahoma Pub. Co., supra*, this Court quoted with approval the holding in *McKenny v. Carpenter*, 42 Okl. 410, 141 P. 779 (780) (1914) wherein it is stated: ". . . where the article itself is not libelous per se, there must be an allegation of special damages, before a recovery can be had. . . . It is insufficient to allege generally that the plaintiff 'was and is greatly and permanently injured and damaged in his good name and reputation and was and is exposed to public contempt, hatred, and ridicule and has been caused to resign his position with the said city of Ardmore and has been damaged in his business and reputation in the amount of $10,000' without showing by proper averment how the specal damages were occasioned." (Citations omitted.)

Plaintiff contends that the amended petition conforms to the requirements set forth in 12 O.S. 1980, § 1444, and having done so, that is all he is required to do. However, we find no conflict between the requirements enunciated in *Fite, supra*, and § 1444.[1] While the

[1] 12 O.S. 1971, § 1444 provided: "In all civil actions to recover damages for libel or slander, it shall be sufficient to state generally what the defamatory matter was, and that it was published or spoken of the plaintiff, and to allege any general or special damage caused thereby, *and the plaintiff to recover shall only be held to*

amended petition does make general allegations of special damages alleged to have been sustained by the plaintiff, it is demurrably deficient in its failure to aver how the special damages were occasioned. *Haynes v. Alverno Heights Hospital*, Okl., 515 P.2d 568 (1973).

We next consider the requirements for a petition for libel per quod to withstand a demurrer with reference to innuendo.

The leading case in Oklahoma is *Kee v. Armstrong, Byrd & Co.*, 75 Okl. 84, 182 P. 494 (1919). In addressing the subject of libel per quod, the Court said (498):

> "If the publication is libelous, it must come within that class of cases as being reasonably susceptible of a defamatory as well as an innocent meaning, and those publications that are termed and designated as not libelous per se. In order for the petition to state a cause of action, it is necessary for the plaintiff to plead by way of inducement or averment, colloquium and innuendo, certain extrinsic facts which connect the plaintiff with the libelous publication and to plead the meaning the words have and that they would be understood to have in connection with the libelous article as published."

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prove that the matter was published or spoken by the defendant concerning the plaintiff. As a defense thereto the defendant may deny and offer evidence to disprove the charges made, or he may prove that the matter charged as defamatory was true, and in addition thereto, that it was published or spoken under such circumstances as to render it a privileged communication." (Emphasis addde.)

The emphasized portion of the statute was declared unconstitutional in *Martin v. Griffin Television, Inc.*, Okl., 549 P.2d 85 (1976) pursuant to a determination that legislative creation of presumed malice by the State of Oklahoma is unconstitutional. The Legislature repealed 12 O.S. 1971, § 1444 by Laws 1080, c. 68 § 1, emerg. eff. April 10, 1980, and reinacted the section as § 1444.1, deleting only that portion declared unconstitutional, by Laws 1981, c. 21, § 2, operative April 7, 1981).

The Court further quoted with approval from the case of *Penry v. Dozier*, 161 Ala. 292, 49 South. 909 in part as follows:

> "An 'innuendo' is only explanatory of the subject-matter . . . and is and can be explanatory only of such matter. It cannot extend the sense of the words beyond their own meaning unless something is put upon the record for it to explain (citations omitted). An innuendo cannot make a thing certain which is, in fact, uncertain. An innuendo cannot enlarge or restrict the natural meaning of words, nor can it introduce new matter. An innuendo cannot be proved, and it is for the court to decide whether given words or given publications are capable of the meaning ascribed to them by the innuendo, and for the jury to decide whether such meaning is truly ascribed to them. (Citations omitted.) Where words claimed to be defamatory are capable of conveying an innocent meaning, then there must be an averment and an innuendo showing not only that the words are intended by plaintiff in a defamatory sense, but that the hearers may have understood the language as conveying the alleged defamatory meaning. (Citation omitted.)"

And again (at p. 500) citing many authorities in support:

> ". . . an innuendo cannot be used to enlarge the meaning of words, nor attribute to them a meaning which they would not bear."

In *Oklahoma Pub. Co. v. Kendall*, 96 Okl. 194, 221 P. 762 (1923) it is held that the mere allegation in the petition that a publication alleged to be libel per quod that the publication was intended to charge plaintiff with a specific crime is not sufficient, and being mere gratuitous conclusion of the pleader, cannot give the words a meaning which they do not otherwise have. In

accord, see *Phoenix Printing Co. v. Robertson*, 80 Okl. 191, 195 P. 487 (1921).

In view of the foregoing authorities, we hold that the amended petition in the case before us is fatally deficient in allegations of innuendo sufficient to withstand a demurrer to the petition.

But there remains for our consideration the question of whether the petition *may by amendment* state a cause of action for libel per quod. The trial court held and determined that the petition could not be amended to state a cause of action, thus dismissing said cause with prejudice in the trial court's ruling sustaining the demurrer to the petition. Plaintiff challenges the ruling of the trial court.

Title 12 O.S.1981, § 318 provides: "If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court, in its discretion, shall direct."

In *Tipton v. Standard Installment Finance Company*, Okl., 418 P.2d 309 (1966), this Court, in construing said statute said:

> "As will be noted from a reading of said statute, the allowance of such amendments is therein placed within the discretion of the court, and is not thereby made a matter of right."

In the case before us, no issue is raised as to the timeliness of a request to amend the amended petition as was present in *Tipton, supra*. Here, the trial court sustained defendants' demurrer to the petition and simultaneously determined that the deficiencies in the petition could not be cured by amendment. If the ruling of the trial court was reversible error in that the deficiencies might reasonably have been cured by amendment, then this Court should upon reversal accord the plaintiff an opportunity to amend within a reasonable time.

When tested by the foregoing authorities pertaining to the necessary allegations of a petition to state a cause of action for lible per quod, we hold that all of the publications before us, including the cartoon which appeared in the newspaper on August 11, 1978, are clear and unequivocal in their meaning and import and therefore immutable to innuendo.

II.

The cartoon published on August 11, 1978, plaintiff urges, may become actionable as libel per quod by amendment to the petition. While the amended petition contains no allegations of innuendo pertaining to that publication, plaintiff *argues* in his brief: "The scurrilous effigy clearly shows a character that looks like the Appellant sucking upon a sewer pipe; and, conincidentally the end of that sewer pipe that he is sucking on just happens to have the appearance of a male penis." Thus, plaintiff reasons, in effect, the publication by innuendo is capable of charging him with the crime of sodomy.

The rules by which a pictorial cartoon's amendability to innuendo to explain its meaning and import are the same as in the case of writings. While, as we have heretofore pointed out, innuendo may be explanatory of the meaning of the publication alleged to be libelous, whether pictorial or writings, and of the understanding imparted to the ordinary viewer of the publication, innuendo cannot be used to enlarge that meaning or to attribute to it a meaning which it will not bear. An objective examination of the cartoon published on August 11, 1978, neither by its unembellished presentation nor by the addition of any possible innuendo imparts to the plaintiff the commission of the crime of sodomy, and when viewed in its most derogatory sense, does no more than express the writer's opinion of the political tactics of plaintiff's political campaign.

The ruling of the trial court sustaining demurrers to the original and amended petition and determining that the petition's defects are not amendable is affirmed:

BARNES, C.J., IRWIN, HODGES, and HARGRAVE, JJ., concur.

SIMMS, V.C.J., concurs in result.

WILSON, J., concurs in part and dissents in part.

DOOLIN, J., dissents.

OPALA, J., certified his disqualification.

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

[Filed Oct. 12, 1983]

Wednesday, October 12, 1983

THE CLERK IS DIRECATED TO ISSUE THE FOLLOWING ORDERS:

55,431 George Miskovsky v. World Publishing Company, a corp. and Newspaper Printing Corporation, a corp.
Rehearing denied.
CONCUR: Barnes, C.J., Simms, V.C.J., Irwin, Hodges, Lavender, Hargrave, JJ.
DISSENT: Doolin, J.
DISQUALIFIELD: Opala, J.

55,932 Brooks H. Bearde[illegible] v. Group Hospital Service d/b/a Blue Cross & Blue Shield of Oklahoma.
Certiorari denied.
CONCUR: Barnes, C.J., Simms, V.C.J., Irwin, Hodges, Doolin, Hargrave, Opala, JJ.
DISSENT: Lavender, J.

56,433 In the Matter of the Estate of James C. Gilliam, Deceased.
Certiorari denied.
CONCUR: Simms, V.C.J., Irwin, Hodges, Lavender, Doolin, JJ.
DISSENT: Barnes, C.J., Hargrave, Opala, JJ.

56,456 Sam Nayfa d/b/a Sammy's Charcoal Hamburgers v. Joseph Farris.
Certiorari denied.
CONCUR: Barnes, C.J., Simms, V.C.J., Irwin, Hodges, Lavender, Doolin, Hargrave, JJ.
DISSENT: Opala, J.

57,645 Security Bank etc. v. Leslie Ben Winter and Jeanette K. Winter, husband and wife.
Certiorari denied.
CONCUR: Barnes, C.J., Simms, V.C.J., Irwin, Lavender, Doolin, Hargrave, Opala, JJ.
DISSENT: Hodges, J.

58,668 Michael Dale Plunkett v. Tammy Lee Plunkett.
Rehearing denied.
CONCUR: Barnes, C.J., Sims, V.C.J., Irwin, Lavender, Doolin, Hargrave, JJ.
DISSENT: Hodges, Opala, JJ.

59,013 In re Claim of: David Henderson v. Leeway Motor Freight, Inc. and the Workers' Compensation Court
Certiorari denied.
CONCUR: Barnes, C.J., Simms, V.C.J., Irwin, Hodges, Lavender, Opala, JJ.
DISSENT: Doolin, Hargrave, JJ.

59,837 Danny L. Barbee v. Wachob Industries, Inc., Home Insurance Company and Workers' Compensation Court.
Certiorari denied.
CONCUR: Barnes, C.J., Simms, V.C.J., Irwin, Lavender, Doolin, Hargrave, Opala, JJ.
DISSENT: Hodges, J.

59,839 Lee Way Motor Freight, Inc. v. Frank W. Stephenson, Own Risk and the Workers' Compensation Court of Oklahoma.
Certiorari denied.
CONCUR: Barnes, C.J., Sims, V.C.J., Irwin, Hodges, Lavender, Doolin, Hargrave, Opala, JJ.

/s/ Don Barnes
Chief Justice

APPENDIX D

IN THE DISTRICT COURT IN AND FOR
CREEK COUNTY
(Drumright Division)

STATE OF OKLAHOMA

Case No. C-79-8

GEORGE MISKOVSKY,
Plaintiff,

vs.

WORLD PUBLISHING COMPANY, a Corporation; and
NEWSPAPER PRINTING CORPORATION, a Corporation,
Defendants.

[Filed May 16, 1980]

FIRST AMENDED PETITION

I.

Defendant, WORLD PUBLISHING COMPANY, is an Oklahoma corporation licensed to do business in the State of Oklahoma, with its principal place of business in Tulsa, Oklahoma. Defendant, NEWSPAPER PRINTING COMPANY, is an Oklahoma corporation licensed to do business in the State of Oklahoma, with its principal place of business in Tulsa, Oklahoma.

II.

Defendants are engaged in printing, publishing, and circulation of a newspaper known as The Tulsa World, a

newspaper published in Tulsa, Oklahoma, and of general circulation in Creek County and the State of Oklahoma.

III.

The Plaintiff, GEORGE MISKOVSKY, is a resident of Oklahoma City, graduate of the University of Oklahoma, and a widely known practicing attorney there since he was admitted to the Bar in 1936. He has a reputation of being a successful and responsible attorney and member of his profession. He is married, has four children and ten grandchildren. He has also been a successful businessman; has been active in civic and social affairs in the community and State, and at all times herein referred to, Plaintiff was a duly qualified and filed candidate for the office of United States Senator.

IV.

On the 11th day of August, 1978, the defendants, by and through their agents, servants, and employees, maliciously composed and published concerning the Plaintiff, an editorial on the front page of The Tulsa World entitled, "Voice From the Sewer", which contained false and defamatory matter designed to injure Plaintiff GEORGE MISKOVSKY'S character and reputation, professional standing in the community, and chances to be elected United States Senator. The maliciously false and defamatory matter accuses Plaintiff, inter alia, of irresponsibly making an effort to smear Governor David Boren with an implication of homosexuality, of taking the prize for the filthiest stunt that has ever been pulled by a serious candidate for major public office in this State, of stooping to the lowest depths of mudslinging and obscene electioneering in the history of gutter politics, and of making a charge with a voice from the sewer. A true and correct copy of said editorial as above stated is attached hereto marked Plaintiff's "Exhibit 3" and made a part hereof by reference.

V.

The Defendants are possessed of vast holdings, are reasonably worth many millions of dollars, and are capable of responding to compensatory and exemplary damages complained of and prayed for herein.

The Plaintiff, GEORGE MISKOVSKY, alleges and states the libel herein complained of was a visciously and maliciously done with utter disregard of the truth and directed at and toward the Plaintiff.

The Defendant's intent and purpose was to influence the public opinion and hold the Plaintiff up to scorn, obliquy, disrespect and ridicule.

The Defendant published the villifying, libelous and slanderous writings which were calculated and designed to set off widespread villification, libel and slander of the Defendant.

Defendant did, with utter disregard for the truth and intentionally or with reckless disregard for the truth and facts, maliciously accuse the Plaintiff of crimes which are violation under the penal laws of the State of Oklahoma. The Defendants did intend to infer by their writing and characterizations that the Plaintiff charged David L. Boren with homosexuality which constitutes the crime of criminal libel and slander. Those writings and characterizations did create in the minds of the multitude of people that concept, thought and belief.

The Defendant's malicious libel and slander of Plaintiff was continued over a period of several days as will be seen by the writings and characterizations complained of herein.

The Plaintiff alleges that at all times the things herein complained of were written by Defendants against the Plaintiff, the Defendants were openly and actively supporting David L. Boren as their candidate for United States Senate and did so with various writings, editorials

and feature stories that otherwise were not afforded to any other candidates in the United States Senate race.

The vicious and malicious libel and villification that is herein complained of was done to falsely accuse the Plaintiff politically, personally and professionally, and as a basis for further editorializing affirmatively for their candidate and on a false premise, to-wit: That the Plaintiff had charged and accused their candidate of being a homosexual and of frequenting with homosexuals.

This premise is completely false and that fact was known to the Defendant but the Defendant persisted with its accusations and implications.

In this regard, the Plaintiff says that on the 9th day of August, 1978, at the Ponderosa Restaurant in Canadian County, for the first time in a public forum Plaintiff heard David Boren catagorically charged by another candidate, Anthony Points, of "frequenting with homosexuals", and of being "a homosexual".

Prior to this public attack and charge by Points, the Plaintiff had heard rumors of such behavior and of Boren being associated with persons of such purported behavior, and the Defendant likewise knew of such rumors and that same had been in circulation for four years or more. These rumors were verified by the governor's own staff, which fact the Defendant was aware of and knew.

The Ponderosa public meeting was sponsored by the Women's Democratic Club of Canadian County and was attended by three candidates for the United States Senate, George Miskovsky, Anthony Points and Dean Bridges. This was also known to the Defendant.

Other candidates were invited to the meeting, but only these three attended and spoke.

VI.

After candidate Points, made the charges about Boren at the Ponderosa, i.e., that David Boren frequented with and was a homosexual, Plaintiff believed then and believes now that it was not only appropriate for him to ask the Governor to answer the charge but it was his duty to call this to the attention of the Governor and the voters, and give the Governor an opportunity to answer straight forward questions concerning the charge.

To make certain there was no question about the rhetoric, the Plaintiff communicated his questions in a typewritten letter to the Governor and released copies of the letter to the press.

As a result of asking the questions of Boren, Plaintiff became the target of a vicious, malicious, and libelous villification lauched by the Defendant and thereafter other members of the news media. This was one of the intended purposes of the Defendant's defamatory and libelous commentary and characterizations of Plaintiff.

The Defendants made the following comments in the news columns which illustrate its efforts to maliciously and viciously, libel and villify the Plaintiff.

The Plaintiff alleges and states that this is and was one of the most vicious, and villifying efforts made by the Defendants against any public servant, past or present.

As a direct and proximate result of the Defendants malicious compaign of libel and villification, against Plaintiff, he suffered and experienced extreme mental, emotional and physical anquish, and his reputation as a lawyer was damaged and injured; his social standing destroyed and his name was besmirched.

All of which has caused the Plaintiff irreparable physical, mental, emotional and financial damage and injury.

VII.

A copy of Plaintiff's letter to David L. Boren above mentioned is attached hereto as Plaintiff's "Exhibit 1" and made a part hereof by reference.

A copy of the flyer wherein Anthony Points charged David L. Boren with frequenting with homosexuals is attached hereto as Plaintiff's "Exhibit 2" and made a part hereof by this reference.

On August 11, 1978, the Defendant in two front page stories "Boren Issues Denial . . ." and "Media Blast Circular Maligning Governor", and a front-page editorial "Voice from the Sewer", maliciously and intentionally libeled and villified Plaintiff, a copy of which is attached hereto as Plaintiff's "Exhibit 3" and made a part hereof by this reference.

On Saturday, August 12, 1978, Defendant published an (AP) story entitled "Miskovsky says air had to be cleared" this article is attached hereto as Plaintiff's "Exhibit 4" and made a part hereof by this reference.

On August 13, 1978, the Defendant, as a part of its plan and scheme to maliciously villify Plaintiff, published a front page news analysis entitled "Sympathetic Backlash Might Aid Boren's Senate Bid," which is attached hereto and made a part hereof as Plaintiff's "Exhibit 5".

On Monday, August 14, 1978, the Defendant in furtherance of its intentional plan and scheme to further villify plaintiff, published another (AP) story entitled "Retractions Demanded by Miskovsky", which is attached hereto and made a part hereof by reference, and marked Plaintiff's "Exhibit 6".

VIII.

The said defamatory matter was published within three weeks of the date of the primary election for the United States Senate.

IX.

That the above stated articles and editorials when considered as a whole engenders in the minds of the reader a conclusion, impression, or opinion of the Plaintiff that is defamatory and, as such, tends to expose Plaintiff, GEORGE MISKOVSKY, to public hatred, contempt and abliquy, and is libelous per se; that the said articles and editorials were composed and published by the defendants, well knowing, the same to be false or unwilling to ascertain the true facts, and was done with reckless and wanton disregard of the truth.

X.

That the statements complained of in the aforesaid publications were wholly false, unprivileged, vicious, and malicious and the Defendant by means of said publication intended to damage and injure the Plaintiff, GEORGE MISKOVSKY, and Plaintiff has been injured in his character and reputation, professional standing in the community, and his chances of becoming United States Senator were completely destroyed, all to his actual damage in the sum of Five Million Dollars ($5,000,000.00).

XI.

Further, that Plaintiff has suffered loss of business in his law firm. That Plaintiff has suffered mental anguish and humiliation and his chances of becoming United States Senator were completely destroyed all as a result of the malicious acts of the Defendant, and all to Plaintiff's special damages in the sum of Five Million Dollars ($5,000,000.00).

XII.

The publications complained of above were willful and malicious and by reason thereof the Plaintiff, GEORGE MISKOVSKY, is entitled to punitive damages in the sum of Fifteen Million Dollars ($15,000,000.00).

WHEREFORE, Plaintiff prays judgment against the defendants in the sum of Five Million Dollars ($5,000,000.00) actual damages, Five Million Dollars ($5,000,000.00) special damages, and Fifteen Million Dollars ($15,000,000.00) by way of punitive damages, the total of which is Twenty-Five Million Dollars, ($25,000,000.00), for which Plaintiff prays and for costs and all other just and proper relief to which Plaintiff in law is entitled.

EVERETT J. SWEENEY
Suite 100 Commerce Building
Norman, Oklahoma 73069

ED MORRISON
505 Center Office Building
Tulsa, Oklahoma 74127

Attorneys for Plaintiff

BY _____
ED MORRISON

CERTIFICATE OF MAILING:

I, Ed Morrison, do hereby certify that I mailed a true and correct copy of the above and foregoing First Amended Petition to Boone, Ellison & Smith, ATTN: James O. Ellison, Edwin S. Hurst and J. Schaad Titus, at 900 World Building, Tulsa, Oklahoma 74103, on this —— day of May, 1980, with proper postage affixed thereto.

_____
ED MORRISON

EXHIBIT #1

GEORGE MISKOVSKY, SR.
U.S. SENATE

830 Hightower Building
Oklahoma City, Oklahoma 73102
Telephone
(405) 235-1375

August 10, 1978

The Honorable David Boren
Governor
State of Oklahoma
State Capitol
Oklahoma City, Okla.

Dear Gov. Boren:

Yesterday I attended a noon meeting of the Canadian County Democratic Women's Club at the Ponderosa Restaurant in El Reno. About three dozen members of the club were present as well as club vice president; Mrs. Donald J. (Floretta) Gholston of El Reno, and two other Democratic candidates for the U.S. Senate, Dean Bridges and Anthony Points.

I was called upon to address the group about issues and I did, as did Mr. Bridges.

Mr. Points addressed the group and distributed a campaign flyer (a copy of which is enclosed herewith) containing the following verbatim transcript:

"I am against homosexuals in the school systems. They are a threat to our children. They are like vultures 'preying' on our young.

"I am against homosexuals or bisexuals in office or government. They are a threat to our national security.

They are subject to being blackmailed and will give out a favor or leak information from the government in return for having their homosexual identity kept secret.

"There is a side to David Boren that is a known fact in legal and political circles. And that's the fact that David Boren frequents with homosexuals and I'm putting it lightly.

"I don't think that is what you want for a U.S. Senator." In addition to distributing the above written bulletin, Mr. Points added, among other things, the oral categorical statement, "David Boren is a homosexual."

After the meeting one of the ladies said she had not heard of this before, and others said they had heard rumors about the charge.

It is the first time I have heard this direct, categorical statement made in public by a candidate for the U.S. Senate.

For this reason I am asking you to respond to the following questions:

Do you know what a homosexual or bisexual is?

Are you a homosexual or bisexual?

Have you ever been a homosexual or bisexual?

Have you ever engaged in homosexual or bisexual activity?

I believe it is the right of every citizen, if it can be ascertained, to know if a candidate for U.S. Senator is afflicted with this kind of abnormal behavior.

A U.S. Senator has access to highly sensitive information vital to the defense of this country and our NATO allies. I believe it is the right of every citizen to know if a candidate afflicted with any physical, mental or philosophical weakness that might be dangerous to our national

security or which might jeopardize the best interests of the majority of the people.

If a candidate is a homosexual, a person who is mentally deranged or a person of bizarre philosophical demeanor, then, the people have a right to know it.

And, the candidate should disclose it in order to protect his effectiveness as the representative of the majority and free himself from any politically motivated intrigue, blackmail, extortion or compromise to prevent disclosure of his true identity.

The people are entitled to an immediate response. Such response should be subscribed by you under oath.

Sincerly,

/s/ George Miskovsky
GEORGE MISKOVSKY

EXHIBIT #2

ANTHONY POINTS
Democrat For U.S. Senate

"The People's Voice"

I am in favor of our senior citizen Social Security's fixed income increasing in accordance to inflation.

I am in favor of the Armed Forces adopting a six month active duty enlistment of new recruits, giving them full Veterans benefits and in this program they could keep a respective amount of hair. This program would beef up our military forces to a ready level.

I am in favor of the farmers receiving 100% parity. They are the backbone of our country.

I am in favor of cutting the price of gas and electric bills in half.

I am against the sale of military arms, planes or nuclear devices to Arabs. The Israelis and the Jewish people are our allies, and not the Arabs.

I am against Arabs entering the United States in exchange for the reduction of the price of oil.

Our last three Presidential Administrations have had Communistic overtones from the Panama Canal Treaty through the selling of arms to the Arabs.

Coincidentally!! When Nixon let the Arabs into the United States in 1970, a lot of plutonium started disappearing. Arabs are buying buildings across the United States and are always demanding plutonium for their country. What is to stop them from making nuclear explosives in these buildings and then going back to their own country? I am in favor of conducting a full investigation on the massive amount of plutonium that has been disappearing since 1970.

I am against abortions.

I am against the human baby being cloned.

I am against sex changes.

I am against busing. No student should be forced to attend a different public school other than the one nearest to his residence.

I am against homosexuals in the school systems. They are a threat to our children. They are like vultures "preying" on our young.

I am against homosexuals or bisexuals in office or government. They are a threat to our national security. They are subject to being blackmailed and will give out a favor or leak information from the government in return for having their homosexual identity kept secret.

There is a side to David Boren that is a known fact in legal and political circles and that's the fact that David Boren frequents with homosexuals and I'm putting it lightly. I don't think that is what you want for a U.S. Senator.

It is this type of activity, homosexuals or bisexuals in office along with U.S. Senators being blackmailed that is sending America down the tubes. If we don't have all of our bases covered, we will leave ourselves wide open to destruction in which we shall see a great nation crumble and fall.

Three of my opponents have held office before and not once have they stood on these major issues. They are good at playing verbal volleyball with issues and getting nothing accomplished. All they ever like to do is fool the public, get elected and go party in Washington.

If elected, I will put these issues before the people of Oklahoma for a vote and if passed, "By God" that's the way it's gonna be. Then I'll carry these issues on a national level.

If you believe as I do and are willing to donate one hour of your time in my campaign or a contribution for what you believe in, call me at 947-1698 or 495-1637. I need your support.

APPENDIX E

EXHIBIT 3

BOREN ISSUES DENIAL ON QUESTIONS ABOUT ABNORMAL SEXUALITY

BY CHUCK ERVIN
World Capitol Bureau

OKLAHOMA CITY—Gov. David Boren cut short a campaign trip to western Oklahoma Thursday and returned to Oklahoma City to deny allegations that he is a homosexual.

Democratic U.S. Senate candidate George Miskovsky had asked Boren earlier to state under oath whether he is a homosexual or a bisexual and if he has ever engaged in abnormal sexual activity.

Boren, who also is seeking the Democratic U.S. Senate nomination, issued an immediate denial, calling the statement "utterly ridiculous and categorically untrue. . . . A vicious lie."

The governor was greeted at Wiley Post Airport by 200 cheering supporters that included his wife, Molly, his parents, Mr. and Mrs. Lyle Boren, campaign staffers and state employees.

HE SMILED BROADLY AS THE crowd chanted, "We want Boren."

Asked if he plans legal action, Boren said he would make no decision until after the election.

"We won't be sidetracked by this," he said. "Unfortunately, you can say almost anything about a public official and get by with it."

He added that he doesn't believe the allegation will hurt his campaign.

"People aren't interested in this kind of trash," he said. "They're more interested in the issues.

"I don't think anyone in Oklahoma will be foolish enough to believe this. This shows some of the other candidates are not winning on the issues and are resorting to character assassinations.

I've been under a great deal of scrutiny and the people of Oklahoma know me."

Mrs. Boren, who cut short her own campaign trip to Hugo to be with Boren, said her reaction to the allegation is "to work twice as hard for my husband's election and to reread the 27th Psalm."

At a Capitol press conference earlier Thursday, Miskovsky released the text of a letter he said he has sent to the governor.

THE LETTER POSED FOUR questions to the governor:

Do you know what a homosexual or bisexual is?

"Are you a homosexual or bisexual?

"Have you ever been a homosexual or bisexual?

Have you ever engaged in homosexual or bisexual activity?"

Miskovsky said he was raising the questions because a third Democratic Senate candidate, Anthony Points, has accused the governor of being a homosexual.

Points, 31, is a home remodeling contractor in Oklahoma City. He was a political unknown until several months ago when he ran several newspaper ads announcing his candidacy. He lists his address as a northwest Oklahoma City apartment building.

Attempts to reach Points Thursday for comment were unsuccessful.

Miskovsky produced a leaflet he said was distributed by Points at a Canadian County Democratic women's club meeting.

IT STATED:

"There is a side to David Boren that is a known fact in legal and political circles and that's the fact that David Boren frequents with homosexuals and I'm putting it lightly."

Miskovsky, who was present at the meeting, said Points also verbally accused Boren of being a homosexual.

Although Points could not immediately be reached for comment, Mrs. Floretta Gholston, vice president of the Canadian County Democratic Women's Club, confirmed that Points made the statement attributed to him by Miskovsky and said he had not offered any evidence in support of it.

Miskovsky also failed to offer any evidence, when he was asked Thursday if he had any.

"I believe it is the right of every citizen, if it can be ascertained, to know if a candidate for U.S. senator is afflicted with this kind of abnormal behavior," Miskovsky said in his letter to Boren.

"A U.S. senator has access to highly sensitive information vital to the defense of this country and our NATO allies.

"I BELIEVE IT IS THE RIGHT of every citizen to know if a candidate is afflicted with any physical, mental or philosophical weakness that might be dangerous to our national security or which might jeopardize the best interests of the majority of the people.

"If a candidate is a homosexual, a person who is mentally deranged or a person of bizarre philosophical demeanor, then, the people have a right to know it.

"And the candidate should disclose it in order to protect his effectiveness as the representative of the majority and free himself from any politically motivated intrigue, blackmail, extortion or compromise to prevent disclosure of his true identity."

Miskovsky asked Boren to respond under oath.

Boren's response was to label the statement by Points as "gutter politics."

"The statement is utterly ridiculous and categorically untrue," Boren said.

"I don't know Mr. Points, but if he repeated such a vicious lie, I would not care to know him.

"I will not dignify it with any further response. It's a shame a person has to be subjected to this kind of personal attack in order to serve the public.

"I particularly resent the statement because it reflects on the reputation of my wife, children and family, as well as myself.

"This kind of tactic just makes it even clearer to the people the contrast between the other campaigns and the clean, positive campaign that I intend to continue to run."

Nov. 78

APPENDIX F

EXHIBIT #3-A

OKLAHOMA PRESS
CLIPPING BUREAU
Oklahoma City, Oklahoma

Daily World
Tulsa, Okla.
115, 695

Date—8-11-78

MEDIA BLAST CIRCULAR
MALIGNING GOVERNOR

By The Associated Press

At least three Oklahoma newspapers, including the Tulsa World, and one radio station had immediate strong editorial responses to George Miskovsky's injection of homosexual allegations into the Democratic campaign for the U.S. Senate nomination.

In Oklahoma City, radio station KTOK said the names of Miskovsky and Anthony Points, the candidate who circulated the flyer containing the allegations, should be stricken from the election ballot.

"Such loathesome and degrading statements, which have been made with no proof, speak eloquently of the kind of statesmanship either Miskovsky or Points would lend to the U.S. Senate if they were elected," the editorial read by KTOK's news director, Bob Durgin, said.

"OKLAHOMA GOV. DAVID Boren, in his defense of this gut-shot garbage-pail politics, has my unequivocal support," Durgin said in the editorial.

The KTOK editorial branded the statements "dirt-bag politics."

A Daily Oklahoman editorial prepared for Friday editions said, "George Miskovsky has sunk to a new low in Oklahoma political rhetoric—and for him that takes some doing."

The editorial said Miskovsky's statements were an attempt "to inject some sign of vitality into his moribund campaign."

"WERE IT NOT FOR THE FACT that American law and tradition make it virtually impossible to libel or slander a political figure, Miskovsky's words would be actionable," the Oklahoman editorial said. "As it is, they are merely despicable and stupid."

The editorial notes that Boren is considered the leading candidate in the race.

"So what does an aging ex-politician, hungry for the limelight again, do in a situation like this? More often, than not, he goes to the old mudball," the editorial said.

"Miskovsky should save his gutter theatrics for the next time he is defending some scoundrel in criminal court," the Oklahoman editorial said.

Earlier, in its late edition Thursday afternoon, the Oklahoma City Times said in a front page editorial, the public will see the charges as a "repugnant and dirty attempt to smear Oklahoma's governor."

APPENDIX G

EXHIBIT 3-B

OKLAHOMA PRESS
CLIPPING BUREAU
Oklahoma City, Oklahoma

Daily World
Tulsa, Okla.
115, 695

Date—3-1-78

AN EDITORIAL

VOICE FROM THE SEWER

FORMER STATE Sen. George Miskovsky won himself an unenviable place in Oklahoma history Thursday. He took the prize for the filthiest stunt that has ever been pulled by a serious candidate for major public office in this state.

Oklahoma has seen some mud-slinging and some obscene electioneering in years past. But nothing in the history of gutter politics reaches the depths of Miskovsky's effort to smear Gov. David Boren with an implication of homosexuality.

The smear would be bad enough if made openly and directly, and if Miskovsky himself accepted responsibility for it and was prepared to support the charge. But he did not have the guts to make the charge openly. Instead, he used his own well known name to draw attention to an obscene campaign flyer circulated by an unknown candidate, a candidate to whom no one had paid any attention previously.

Unfortunately, Miskovsky wasn't the only major candidate to circulate the homosexuality smear. It had been whispered around by others.

Even before Miskovsky's news conference, Gov. Boren had been the victim of one of the worst smear campaigns in memory.

The real victim here is not Gov. Boren, but Miskovsky and the others who sacrifice their own reputations and personal honor by circulating this kind of filth.

Miskovsky's charge is truly a voice from the sewer.

APPENDIX H

EXHIBIT 4

Tulsa World
Saturday, August 12, 1978

MISKOVSKY SAYS AIR HAD TO BE CLEARED

OKLAHOMA CITY (AP)—A. U.S. Senate hopeful who wrote Gov. David Boren asking the governor to state under oath whether he is a homosexual said Friday he stands behind his decision to air statements made by a third senatorial hopeful.

George Miskovsky said Anthony Points had made the allegations that the governer is gay while addressing a Canadian County Democratic Women's Club forum at El Reno. Club members later confirmed the statement.

Boren categorically denied the allegation, calling it a "vicious lie."

Miskovsky, Boren and Points are among the candidates seeking the Democratic nomination for the Senate.

"I thought both the governor and the editorial writers overreacted," Miskovsky said. "They acted emotionally as if I had made the charge.

"I had heard the rumor, as have many others, for months. When it came to a head in a public forum, I felt I should report it to the media and give the governor an opportunity to respond."

Miskovsky wrote Boren on Thursday asking the governor to answer Points' allegation. He said his initial purpose for writing the letter was to "clear the air about a bombshell statement made at a public meeting."

But, Miskovsky indicated, the move backfired.

"I'm not a male Anita Bryant and don't want to take on the problems of the gays across the nation, but I still believe that I made the request in a sincere and unvarnished manner and acted in a public service," Miskovsky said.

"My intention at the time was to clear the air and I don't know whether or not this overraction to my letter has hurt my campaign. If I'm to be punished for repeating what I heard in a public meeting, then so be it."

Miskovsky had asked Boren if he knew what a homosexual or bisexual was; if he was a homosexual or bisexual; if he had ever been a homosexual or bisexual and whether he had ever engaged in homosexual or bisexual activity.

Asked what his answers to the four questions would be, Miskovsky said, "To No. 1, I would answer yes and to the rest I would answer no."

Miskovsky said he felt he was the victim of the backlash about the allegations, instead of Points, but added he believes the public "has a right to know if a candidate has any physical, mental or psychological weakness" that might be dangerous to national secuirty.

He added he believed the letter and the airing of the unsubstantiated charge was appropriate and is an issue that needed to be raised.

"If it were turned around and people put out rumors on me that I was gay or homosexual, then I would be glad for someone to make the issue public so I could put the rumors to sleep," Miskovsky said. "I think this whole thing has provided a forum for the governor."

APPENDIX I

EXHIBIT #5

OKLAHOMA PRESS
CLIPPING BUREAU
Oklahoma City, Oklahoma

Sunday World
Tulsa, Okla.
197, 727

Democratic Race Takes Bizarre Twists

SYMPATHETIC BACKLASH MIGHT AID

By CHUCK ERVIN
World Capitol Bureau

OKLAHOMA CITY—Oklahoma's 1978 race for the U.S. Senate has taken first one bizarre twist, then another, culminating in the grotesque and unsubstantiated charge that Gov. David Boren is a homosexual.

A News Analysis

The allegation, made by one Democratic candidate—Anthony Points—and repeated by another—former state senator George Miskovsky—was branded a "vicious lie" by Boren, who also is seeking the nomination.

Most political observers believe the allegation will not greatly harm the Boren campaign for several reasons.

The first is that there was no effort made by either Miskovsky or Points to substantiate it.

Boren moved quickly to deny it, and his wife, family and supporters rallied around him.

Finally, rumors about the governors' sexual preference have circulated for several years, usually spread with great relish by his bitter political enemies.

Although it is impossible to tell for sure, a majority of Oklahomans had probably already heard some word-of-mouth version of Points' allegation.

The fact that it is now out in the open has given the governor the opportunity to officially deny it.

Some observers believe there may even be a sympathy backlash that could push Boren over the 50 percent mark needed to win the Democratic nomination without a run-off.

Most observers believed that was at least a possibility even before Points and Miskovsky injected the homosexuality issue into the campaign.

State Sen. Gene Stipe's surprise entry at the last minute galvanized Boren's complacent workers and kicked off a flurry of activity. His staff says the homosexuality charge has done the same thing.

Although Stipe has talked confidently about winning the election, is a wily veteran of the political wars and has sunk a tremendous amount of money into a media advertising campaign, it is difficult to find his strength.

Local politicians in a number of counties believe he is running third behind Boren and former U.S. Rep. Ed Edmondson of Muskogee.

Some say Stipe's entry created "a lot of talk" in their areas but that the McAlester Democrat hasn't been able to translate the apparent interest into any substantial number of votes.

Edmondson apparently has managed to maintain some strength with organized labor and in his old second district congressional base.

He must overcome the stigma of two earlier defeats in Senate capaigns, however, and is running an underfinanced race.

Another imponderable in the race is the effect of an FBI probe and federal grand jury investigation of Stipe's involvement in the acquisition of a Small Business Administration loan for McAlester Frozen Foods, Inc.

Oliver "Buck" Revell, chief agent for Oklahoma, stated the FBI is checking into allegations of fraud against both the state and federal government.

Stipe has been trying to turn the investigation to his advantage, charging the FBI, U.S. Attorney Larry Patton and Boren with conspiring to smear him politically.

Stipe's most telling point is that the FBI previously investigated his connection with McAlester Frozen Foods and dropped the probe several years ago.

Revell confirmed the earlier investigation, but said it was curtailed because the FBI couldn't get the information it needed from the SBA.

Given the FBI's and Justice Department's investigatory powers, that explanation seemed somewhat lame.

Unless Stipe can somehow turn an ongoing FBI probe of his activities to his advantage, its potential for damage is great.

Stipe's rural, old guard image is not the kind that is likely to win votes in the metropolitan areas either and the time to turn it around is growing short.

Whatever the outcome of the Senate race, it has overshadowed the campaign for governor—usually the glamor race in Oklahoma.

APPENDIX J

EXHIBIT #6

OKLAHOMA PRESS
CLIPPING BUREAU
Oklahoma City, Oklahoma

Daily World
Tulsa, Okla.
115, 695

Date—3-11-78

RETRACTIONS DEMANDED BY MISKOVSKY

By The Associated Press

George Miskovsky has threatened to sue three newspapers and two broadcasters unless they retract editorials that criticized him for asking about Gov. David Boren's sexual orientation.

Miskovsky, 68, who is among those opposing Boren for the Democratic U.S. Senate nomination, said Sunday he will "prepare to file libel and slander actions" against The Tulsa World, plus The Daily Oklahoman, The Oklahoma City Times, television station KWTV and radio station KTOK, all of Oklahoma City, unless the newspapers and broadcasters retract their editorials against him.

Byron Boone, publisher of The Tulsa World, said he would not comment on what his newspaper will do before Miskovsky takes some action, but added, "We wouldn't have run it (the anti-Miskovsky editorial) unless we would've thought it was proper.

When told of the threat, officials of the Oklahoma City newspapers and broadcast stations said they will not retract their editorials.

MISKOVSKY TOUCHED OFF sharp editorial criticism Thursday when he asked Boren to say under oath whether he is or ever has been a homosexual or bisexual.

Boren called allegations that he is a homosexual "a vicious lie," but did not give a sworn statement as Miskovsky asked.

The unsubstantiated homosexual allegations against Boren were raised by Anthony Points, a minor Senate candidate, but were not publicized until Miskovsky asked Boren about the charges.

Though he will produce no evidence, Points also claims he can prove that "40 percent of the people in government, over 50 percent of the people in the school" and most salesmen and people with highpaying jobs are homosexuals.

"MY EDITORIAL WAS VERY simple and legal," said Bob Durgin, news director of KTOK. "I think he'll (Miskovsky) probably go ahead and file suit because he's got nothing to lose now."

Durgin said Miskovsky's lawsuit is "another good way of keeping his name before the electorate."

"KWTV stands behind our editorial," said Ed Turner, KWTV news director.

Joining KTOK and KWTV in refusing to accept Miskovsky's demand, Jim Standard, managing editor of the Oklahoman and Times, said, "The only comment we have is that we plan no retraction."

THE EDITORIALS "Maliciously attack my name, my personal character and my reputation as a lawyer," Miskovsky said. "My family, my friends and I deeply resent the vicious attack which resulted from violent, unthinking and emotional overreaction. . . . These attacks reached an all-time low in gutter and sewer journalism, if indeed it may be called journalism."

"I do want a retraction of the slander, the villification and the libel that was directed at me . . . without any just cause," Miskovsky said.

Miskovsky charged that the editorials were motivated by support he believes news organizations are giving Boren in news coverage as well as editorials.

"I am not expressing any opinion" on Boren's alleged homosexuality, Miskovsky said. "I thought it appropriate that I submit the question to Boren."

MISKOVSKY SAID HE WILL GO to the Oklahoma County court clerk's office at about 10 a.m. Monday to give a sworn statement answering the same questions he asked Boren to answer under oath.

"I have never been, I am not and I have no desire to be homosexual or bisexual," Miskovsky said.

The Oklahoma City lawyer said he will hold a press conference at 2 p.m. Monday at the state Capitol to distribute copies of his sworn statement denying homosexuality and bisexuality.

Miskovsky said he believes his raising of the homosexual issue will help him win votes among "the right-thinking Christian people in Oklahoma" and members of other religions "who abhor the threat of homosexuality infecting the community."

THOUGH MANY POLITICAL Observers rate Miskovsky's chances in the Senate race as poor, Miskovsky said Sunday he has "a good chance to make the runoff and then win the general election."

Miskovsky said he raised the homosexual issue only because he is "deeply concerned about the right things in relation to this country."

"I have no rancor or hatred or bitterness or any desire to punish people who may be homosexuals," Miskovsky said. ". . . we must tolerate them, (but) we should

not condone them or their actions. They're people who need guidance, help, therapy, inspiration and direction to adjust to the accepted folkways and mores of our time.

"And I hope that our civilization never embraces the practice of homosexuality or bisexuality because to me and to my mind the thought of it is tremendously degrading," Miskovsky added. "I think it would deprave a nation and be ruinous to a people."

APPENDIX K

Oklahoma Statutes Tit. 12 § 1441

> Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation, or any malicious publication as aforesaid, designed to blacken or vilify the memory of one who is dead, and tending to scandalize his surviving relatives or friends.

Office-Supreme Court, U.S.
FILED
DEC 29 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-883

In the Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE MISKOVSKY,
Petitioner,

vs.

WORLD PUBLISHING COMPANY and
NEWSPAPER PRINTING CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

*Edwin S. Hurst
J. Schaad Titus
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Attorneys for Respondents

December, 1983

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TABLE OF AUTHORITIES

Cases	PAGE(S)
Akins v. *Altus Newspapers, Inc.*, 609 P.2d 1263 (Okla. 1977), *cert. denied*, 449 U.S. 1010 (1980)	4-5
Bailey v. *Anderson*, 326 U.S. 203 (1945)	10
Black v. *Cutter Laboratories*, 351 U.S. 292 (1956)	7, 8
Cardinale v. *Louisiana*, 394 U.S. 437 (1969)	8, 9
Cox Broadcasting v. *Cohn*, 420 U.S. 469 (1975)	9
Durley v. *Mayo*, 351 U.S. 277 (1956)	7
Fite v. *Oklahoma Pub. Co.*, 146 Okla. 150, 293 P. 1073 (1930)	4
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)	7
Hanson v. *Denckla*, 357 U.S. 235 (1958)	9
Haynes v. *Alverno Heights Hospital*, 515 P.2d 568 (Okla. 1973)	5
Herb v. *Pitcarin*, 324 U.S. 117 (1944)	7
Kee v. *Armstrong, Byrd & Co.*, 75 Okla. 84, 182 P. 494 (1919)	5
McKenny v. *Carpenter*, 42 Okla. 410, 141 P. 779 (1914)	5
Michigan v. *Long*, ___ U.S. ___, 103 S.Ct. 3469 (1983)	7
Miskovsky v. *Oklahoma Pub. Co.*, 654 P.2d 587 (Okla. 1982)	4
New York Times v. *Sullivan* 376 U.S. 254 (1964)	5
New York Times Company v. *Jascalevich*, 439 U.S. 1317 (1978)	7
Oklahoma Pub. Co. v. *Kendall*, 96 Okla. 194, 221 P. 762 (1923)	5
Phoenix Printing Co. v. *Robertson*, 80 Okla. 191, 195 P. 487 (1921)	5
Radio Station WOW v. *Johnson*, 326 U.S. 120 (1945)	9
Street v. *New York*, 394 U.S. 576 (1969)	9, 10

AUTHORITIES CONTINUED — PAGE(S)

Thompon v. *Newspaper Printing Corporation*, 325 P.2d 945 (Okla. 1958) 5

Webb v. *Webb*, 451 U.S. 493 (1981) 8, 9, 10

Winters v. *Morgan*, 576 P.2d 1152 (Okla. 1978) 5

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No. 83-883

In the
Supreme Court of the United States
OCTOBER TERM, 1983

GEORGE MISKOVSKY,
Petitioner,

vs.

WORLD PUBLISHING COMPANY and
NEWSPAPER PRINTING CORPORATION,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents, World Publishing Company and Newspaper Printing Corporation, respectfully submit that a Writ of Certiorari should not issue to review the Opinion and Judgment of the Supreme Court of the State of Oklahoma entered on June 21, 1983.

OPINIONS AND ORDER BELOW

The Opinion of the Supreme Court of the State of Oklahoma in this case is set forth in Appendix A, pages 1a, *et seq.*, to the Petition for Writ of Certiorari. In that Opinion the court adopted its Opinion decided and filed the same date in *Miskovsky* v. *Tulsa Tribune Company and Newspaper Printing Corporation* as being the law of the case and that Opinion is set forth in Appendix B, pages 3a, *et seq.*, to the Petition. The Order denying Rehearing is set forth in Appendix C, pages 18a, *et seq.*, to the Petition.

JURISDICTION

The jurisdiction of this Court is sought to be invoked under 28 U.S.C. § 1257(3) to review an Opinion of the Supreme Court of the State of Oklahoma rendered on June 21, 1983. Petitioner's Petition for Rehearing was denied on October 12, 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. No Constitutional provisions are involved in the Opinion sought to be reviewed.

2. 12 Okla. Stat. § 1441 (1981).

FEDERAL QUESTIONS

Petitioner identifies three federal questions which he seeks to raise.

The first and second overlap. Therein, Petitioner asserts that the United States Constitution does not supplant state defamation law on the issues of defamatory meaning, defamatory statements of opinion or burden of proof.

In the third, Petitioner asserts that the First and Fourteenth Amendments prohibit a rule of law which grants virtual absolute immunity to a media defendant for libel suits brought by a public figure.

STATEMENT OF THE CASE

While Petitioner's Statement of the Case errs in a number of respects, the only factual matters requiring correction is the statement that "Respondents are privately held media corporations controlled by the Jones family" and the implication in Petitioner's argument that Respondents are a multi-media conglomerate. Both the statement and the implication are incorrect. Respondents are World Publishing Company, which publishes the Tulsa World newspaper, and Newspaper Printing Corporation, which is World Publishing Company's agent for printing and distribution. World Publishing Company and Tulsa Tribune Company are separately owned and controlled corporations, publishing respectively the Tulsa World newspaper and the Tulsa Tribune newspaper.[1] Respondent, World Publishing Company, publishes a morning and Sunday newspaper and the Tulsa Tribune Company publishes an evening newspaper. Newspaper Printing Corporation is an operating and distributing company jointly owned by World Publishing

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[1] *Miskovsky* v. *Tulsa Tribune Company and Newspaper Printing Corporation* is also pending before this Court on a Petition for Writ of Certiorari, No. 83-882, involving newspaper publications arising out of the same subject matter, Petitioner's questioning of then Senatorial candidate David Boren's sexual preferences. In response to Petitioner's questioning of Senator Boren, the Tulsa World Newspaper published six items, five news articles and one editorial which were the publications sued upon and brought before this Court in this case. See Appendices E through J, pages 33a-49a, to the Petition for Writ of Certiorari. The Tulsa Tribune Company published six articles and three editorial cartoons. While the basic subject of the news event was the same, the publications by the Tulsa World and the Tulsa Tribune newspapers differ in many respects as may be noted by a comparison of the items.

Company and Tulsa Tribune Company under the auspices of the Newspaper Preservation Act, 15 U.S.C. § 1801 *et seq.* (1970).

On June 21, 1983, the Oklahoma Supreme Court filed an Opinion affirming the Order of the trial court sustaining a Demurrer to the Petition and determining that the Petition's defects were not amendable.[2]

The Oklahoma Supreme Court determined that the "tenor and import" of the publications in question and the issues presented on appeal were the same as those in *Miskovsky* v. *Tulsa Tribune Company and Newspaper Printing Corporation,* decided by it on the same date and which is now pending before this Court on a Petition for a Writ of Certiorari, No. 83-882. The Oklahoma Supreme Court adopted what was said in *Miskovsky* v. *Tulsa Tribune* as the law in the case.

In *Miskovsky* v. *Tulsa Tribune,* the Oklahoma Supreme Court applied the Oklahoma law of libel per se and libel per quod in analyzing the publications and in holding that they were not defamatory. In doing so, the Oklahoma Supreme Court cites, discusses and relies upon numerous Oklahoma cases including the following: *Miskovsky* v. *Oklahoma Pub. Co.,* 654 P.2d 587 (Okla. 1982); *Fite* v. *Oklahoma Pub. Co.,* 146 Okla. 150, 293 P. 1073 (1930); *Akins* v. *Altus*

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[2] As is apparent from Appendix D to the Petition for a Writ of Certiorari to this Court, the Oklahoma Supreme Court affirmed the trial court's Order sustaining a Demurrer to the First Amended Petition in the trial court and not the original Petition as is stated in the Oklahoma Supreme Court Opinion. That error is not material as the First Amended Petition contained the same allegations as the original Petition adding only allegations of special damages.

Newspapers, Inc., 609 P.2d 1263 (Okla. 1977), *cert. denied*, 449 U.S. 1010 (1980); *Winters* v. *Morgan*, 576 P.2d 1152 (Okla. 1978); *Thompson* v. *Newspaper Printing Corporation*, 325 P.2d 945 (Okla. 1958); *McKenny* v. *Carpenter*, 42 Okla. 410, 141 P. 779 (1914); *Haynes* v. *Alverno Heights Hospital*, 515 P.2d 568 (Okla. 1973); *Kee* v. *Armstrong, Byrd & Co.*, 75 Okla. 84, 182 P. 494 (1919); *Oklahoma Pub. Co.* v. *Kendall*, 96 Okla. 194, 221 P. 762 (1923); and *Phoenix Printing Co.* v. *Robertson*, 80 Okla. 191, 195 P. 487 (1921).

In finding the publications non-defamatory, the Oklahoma Court also relied on the Oklahoma statutory definition of libel, 12 Okla. Stat. § 1441 (1981), and quoted extensively from two Oklahoma cases, *Kee* v. *Armstrong, Byrd & Co., supra*, and *Fite* v. *Oklahoma Pub. Co., supra.*

REASONS FOR NOT GRANTING THE WRIT

The Oklahoma Supreme Court did not decide this case on any of the asserted federal questions raised in the Petition for Writ of Certiorari, nor were any of them involved in this case.

Petitioner argues that the Oklahoma Supreme Court erroneously concluded that under *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) and its progeny, the Oklahoma law of libel had been supplanted by federal constitutional law and that the court incorrectly believed that state law on the issues of defamatory meaning, opinion and burden of proof have been superseded and controlled by the requirements of the Constitution. But a fair reading of the Opinion in this case makes it crystal clear that the Oklahoma Supreme Court was applying the Oklahoma law of

libel per se and libel per quod in analyzing the publications and in holding that they were not defamatory.

Petitioner also asserts that the Supreme Court of Oklahoma has shifted the burden of proof under the belief that the Constitution requires a public figure plaintiff to prove falsity. But burden of proof is not involved in this case. Here there was deficiency of allegations, not a deficiency of proof. Despite general allegations to the contrary, the publications were found to be non-defamatory. Speaking of the publications, the Oklahoma Supreme Court noted that "The factual data therein set forth as facts are true as is alleged in the allegations in plaintiff's petition". Appendix B, page 11a to the Petition.

Petitioner further asserts that the Oklahoma Supreme Court's Opinion in this case effectively grants virtual absolute immunity to the media from libel suits brought by a candidate for public office in violation of the First and Fourteenth Amendments. But, this contention ignores the fact that the Oklahoma Supreme Court carefully analyzed each of the allegedly libelous publications and found them to be non-defamatory under recognized and existing libel law. It does not extend immunity from libel suits to media defendants.

I

The Opinion of the Oklahoma Supreme Court was based on adequate and independent state grounds.

It has been a long standing principle that this Court will not review judgments of state courts that are based on adequate and independent state grounds. *Herb* v. *Pitcairn*, 324 U.S. 117, 125, 128 (1944); *New York Times Company* v. *Jascalevich*, 439 U.S. 1317, 1325 (1978); *Michigan* v. *Long*, ___ U.S. ___, 103 S.Ct. 3469 (1983).

If the state court decision indicates that it is based on adequate state grounds, or if federal precedents are noted in the decision, but there appears a bona fide, separate adequate and independent state ground, this Court will not undertake a review of those questions. *Michigan* v. *Long*, 103 S.Ct. at 3476. Petitioner further has the burden of estblishing the jurisdiction of this Court. *Durley* v. *Mayo*, 351 U.S. 277, 281 (1956).

Further, in cases where broad language is used in a state court decision, the Court should not pass on the federal question mentioned in the state court Opinion "where it appears that the judgment rests on adequate state grounds". *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297-98 (1956).

Although the Oklahoma Supreme Court did quote from *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), a statement on opinions, it is obvious from a fair reading of the Opinion that the Oklahoma Supreme Court did not base its decision on that statement, nor was such necessary to the decision reached, but the Opinion determined the publications to be non-defamatory under numerous decisions

of the Oklahoma Supreme Court which formed adequate state grounds for affirming the trial court. As noted in *Black* v. *Cutter Laboratories*, 351 U.S. at 297, "This Court, however, reviews judgments, not statements in opinions."

With this in mind, from a fair reading of the Opinion of the Supreme Court of Oklahoma, it is clear that this decision was based not on the federal questions sought to be reviewed, but upon the completely adequate state grounds that the publications in question were not defamatory under a long line of Oklahoma decisions dealing with the interpretation of allegedly defamatory publications. As such, this Court lacks jurisdiction to review the issues presented.

II

Petitioner's first and second asserted federal questions were not timely raised in the Oklahoma courts.

The first two federal questions sought to be raised by Petitioner were raised for the first time in the Petition for Rehearing before the Oklahoma Supreme Court.

Petitioner did not raise any issue concerning alleged defamatory opinions or the asserted supplantation of state defamation law by the United States Constitution in his Brief-in-Chief or Petition-in-Error to the Oklahoma Supreme Court. Appendix A to this Brief.

Before a state court decision can be reviewed in this Court on a claimed impingement of the United States Constitution, the federal claim must have been raised, presented to, and passed upon by the highest state court. *Webb* v. *Webb*, 451 U.S. 493, 495 (1981); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969).

The properly raised federal question determination is a two-fold requirement. The federal question must have been properly raised by the Petitioner in a timely fashion. *Cardinale* v. *Louisiana, supra*; *Hanson* v. *Denckla*, 357 U.S. 235, 243 (1958). And the state court must be "afforded a fair opportunity to address the federal question that is sought to be presented. . . .," *Webb* v. *Webb*, 451 U.S. at 501, or the issue must have been "necessarily decided" 'by the state court when it affirmed the trial court. *Street* v. *New York*, 394 U.S. 576, 582 (1969).

Federal claims are not seasonably presented when such issues are raised for the first time in a petition or motion for rehearing before the state court. *Hanson* v. *Denckla, supra; Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128 (1945). The only exception to this timely raised limitation is where the state court exerted its jurisdiction and actually dealt with the federal question raised first in the motion for rehearing as if the question were properly raised in a timely fashion. *Cox Broadcasting* v. *Cohn*, 420 U.S. 469, 476 (1975); *Radio Station WOW* v. *Johnson*, 326 U.S. at 128. That, however, is not present in this case as the Oklahoma Supreme Court denied rehearing without an opinion. Appendix B to this Brief and Appendix C to the Petition.

Accordingly, the issues regarding opinions and the supplantation of state defamation law by Constitutional provisions were not timely raised in the Oklahoma courts and this Court is without jurisdiction to review those issues.

III

Petitioner's third asserted federal question was not passed upon by the Oklahoma courts.

The alleged absolute immunity from libel of media defendants was not passed upon by or a part of the decision of the Oklahoma Supreme Court. For the issue to be a properly raised federal question, the Oklahoma Supreme Court must have actually decided the issue presented to this Court or must have necessarily dealt with such issue. *Webb* v. *Webb*, 451 U.S. at 501; *Street* v. *New York*, 394 U.S. at 582; *Bailey* v. *Anderson*, 326 U.S. 203, 206 (1945).

Although Petitioner in an indirect fashion raised the absolute immunity question in his Brief-in-Chief to the Oklahoma Supreme Court, the decision of the Oklahoma Supreme Court did not in any way pass upon, consider or base its decision on an absolute immunity question. In *Webb* v. *Webb*, 451 U.S. at 501, this Court stated:

> "At the minimum, however, there should be no doubt from the record that a claim under federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court."

Petitioner's third asserted federal question regarding alleged absolute immunity for media defendants, even if

properly raised, was not addressed or decided in the Oklahoma Supreme Court and thus, jurisdiction is not present to review this issue.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondents

December, 1983

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CERTIFICATE OF SERVICE

I, Edwin S. Hurst, a member of the Bar of the Supreme Court of the United States and counsel of record for the Respondents, hereby certify that, pursuant to the Rules of the Supreme Court, three (3) copies of the foregoing Brief in Opposition were served on the following parties:

Everett J. Sweeney
Counsel of Record
E. Joe Lankford
303 South Peters
Norman, Oklahoma 73069

by depositing said copies in the United States Mail, properly addressed and postage fully prepaid, this _____ day of December, 1983.

All parties required to be served have been served.

Edwin S. Hurst
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APPENDICES

APPENDIX A

[Filed June 24, 1980]

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

GEORGE MISKOVSKY, Appellant,	)	
vs.	)	
	)	No. 55,431
WORLD PUBLISHING COMPANY, a corporation; and NEWSPAPER PRINTING CORPORATION, a corporation, Appellees.	)	

PETITION IN ERROR

Appellant, GEORGE MISKOVSKY, alleges and states:

1. This appeal is taken from a decision of the District Court of Creek County, State of Oklahoma, Honorable Charles S. Woodson, Judge of the District Court presiding.

2. The case in the Trial Court was styled: George Miskovsky, plaintiff, vs. World Publishing Company, a corporation; and Newspaper Printing Corporation, a corporation, defendants, No. C-79-8.

3. That on the 2nd day of March, 1979, the appellant herein filed his Petition against the named appellees; and thereafter a series of hearings were held on sundry matters, including but not limited to the appellee's Demurrer to the Petition of the appellant; and, on May 8, 1980, after having heard the oral arguments on the Demurrer and after having had the case under advisement pending receipt of Briefs, and after having received the Briefs and reviewing the file and considering the Briefs, the Court did sustain the appellee's Demurrer to the appellant's Petition and dismissed the case. A true copy of the letter/order of the Trial Court issued and entered by the Court on May 8, 1980, is attached hereto, marked Exhibit "A" and included herein by reference.

4. The Court, in its Dismissal on May 8, 1980, which was made effective on May 9, 1980, did not allow the appellant leave to amend his Petition; and, thereafter a dispute arose between the attorneys for the respective sides as to whether or not the dismissal was with prejudice or without prejudice. As a result, further hearings were scheduled for June 10, 1980, as to the effect of the Trial Court's letter/order of May 8, 1980.

5. As a result of the disagreement between the attorneys, on May 16, 1980, appellant filed a Motion for Rehearing in the Trial Court and also filed his First Amended Petition.

6. Appellant's Motion for Rehearing was scheduled by the Trial Court for June 10, 1980; and, since said date was preemptive of an appeal of the letter/order of May 8, 1980, appellant timely filed a Petition in Error in this Court on June 6, 1980, that being case No. 55355.

7. Thereafter, on June 10, 1980, the Trial Court considered appellant's Motion for Rehearing as Motion for leave to file a First Amended Petition and granted same. This was, in effect, an approval by the Trial Court of appellant's May 16, 1980, filing of his First Amended Petition.

8. Thereafter, and on June 10, 1980, the Trial Court allowed defendants to orally renew their Demurrer previously filed as to appellant's original Petition and summarily sustained the oral Demurrer as to appellant's First Amended Petition and dismissed appellant's case with prejudice stating that the defects of appellant's First Amended Petition "were not capable of being cured by amendment."

9. It is from the Trial Court's summary dismissal of appellant's cause with prejudice on June 10, 1980, that appellant appeals.

10. The points of law urged by appellant as error committed by the Trial Court are as follows:

(a) Error in dismissing appellant's First Amended Petition with prejudice upon sustaining an oral Demurrer and without granting appellant an opportunity to amend; and

(b) Error in sustaining appellee's oral Demurrer to appellant's First Amended Petition.

11. The relief sought by the appellant is an Order from this Court reversing the Trial Court's sustaining of the appellee's oral Demurrer to appellant's First Amended Petition; or, alternatively, an Order directing the Trial Court to allow appellant to further amend his Petition to conform with the Court's objections or directions.

12. A true copy of the Petition in Error is being filed in the Trial Court, by mail on the same date as the filing of this Petition in Error; and, a true copy of the Petition in Error will be mailed this date to counsel for appellee. All parties to this action are represented by counsel. The names of each represented party with the name and address of counsel for each party is as follows:

GEORGE MISKOVSKY, APPELLANT;

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[APPENDIX]

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WORLD PUBLISHING COMPANY, a corporation and NEWSPAPER PRINTING CORPORATION, a corporation, APPELLEES;

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ATTORNEYS FOR APPELLEES

13. A copy of the Designation of Record, filed by mail in the Trial Court pursuant to Rule 1.20(a) of the Rules of Appellate Procedure in civil cases, is attached hereto.

WHEREFORE, appellant prays that the June 10, 1980, Order of the Trial Court sustaining appellee's Demurrer to appellant's First Amended Petition be set aside and that the Trial Court be directed to order the appellee to answer appellant's First Amended Petition and allow appellant to proceed with his cause, or, in the alternative, direct the Trial Court to allow appellant to further amend his Petition in conformity with the objections of the Trial Court as to its alleged defects.

Respectfully submitted,

MISKOVSKY, SULLIVAN,
MISKOVSKY, COOKE & GREGG

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APPENDIX B

[Filed June 30, 1983]

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

GEORGE MISKOVSKY,	)	
Appellant,	)	
vs.	)	
	)	No. 55,431
WORLD PUBLISHING COMPANY, a corporation; and NEWSPAPER PRINTING CORPORATION, a corporation,	)	
Appellees.	)	

PETITION FOR REHEARING

COMES NOW George Miskovsky, Appellant, and respectfully represents to the Court that on the 21st day of June, 1983, a decision was rendered by this Court affirming the sustension of demurrer to petition and amended petition and determining that the petition's defects are not amendable entered by the District Court of Creek County.

Miskovsky seeks rehearing for the following reasons, to-wit:

1. That said decision is in conflict with decisions reached by the United States Supreme Court, and erroneously concludes that defamatory statements of opinion are constitutionally protected under the First Amendment when presented in the context of an editorial or editorial cartoon.

2. That said decision undermines Chief Justice Warren Burger's admonition in *Hutchinson* v. *Proxmire*, 99 U.S. 2675 (1979) that the issue of actual malice should be decided by a jury.

3. That said decision violates Miskovsky's rights under the Oklahoma and United States Constitution to a trial by jury.

[APPENDIX]

4. That said decision erroneously misassigned the burden of proof of falsity. See *Wilson* v. *Scripps-Howard Broadcasting Company*, 642 F.2d 371 (6th Cir. 1981) Cert. granted 102 S.Ct. 500.

5. That said decision violates Miskovsky's rights under the Fourteenth Amendment of the United States Constitution to due process of law and equal protection of the law and that the United States Constitution requires a balancing between the rights of the media defendants and the rights of candidates for public office to freedom of speech and protection of reputation.

6. That said decision erroneously ruled as a matter of law that certain libelous statements are not defamatory, therefore, substituting its own opinion and interpretation for that of a jury or an ordinary reader. See *Memphis Publishing Company* v. *Nichols*, 569 S.W.2d 412 (Tenn. 1978); *Wimmer* v. *The Oklahoma Publishing Company*, 1 P.2d 671 (1931).

7. That said decision and the pattern of decisions in Oklahoma favoring the press threaten to chill the speech of candidates for public office in Oklahoma, thereby violating Miskovsky as well as other candidates' First Amendment rights under the United States Constitution.

8. That said decision erroneously concludes that the United States Constitution supplants state defamation law on the issues of defamatory meaning, opinion, and burden of proof as to truth.

9. That said decision misinterprets the common law and statutory law regarding falsity, defamation, and opinion.

10. That said decision contravenes public policy and the general welfare of the people of Oklahoma.

11. That said decision effectively eliminates public figure libel law in Oklahoma and establishes a tyranny of the press.

Respectfully submitted,

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